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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK ANDRE SHARP,

Defendant and Appellant.

G052769

(Super. Ct. No. 15CF1457)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John S. Adams, Judge. Affirmed as modified.

Stephanie M. Adraktas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

Derrick Andre Sharp appeals from a judgment after the jury convicted him of sale or transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a); count 1), and possessing a controlled substance for sale (Health & Saf. Code, § 11378; count 2). Sharp argues the trial court erred in denying his motion to suppress evidence obtained from an unreasonable and unlawful search of his person. Sharp also contends, and the Attorney General concedes, the evidence showed counts 1 and 2 were based upon the single act of transporting methamphetamine. Thus, we modify the judgment to stay the concurrent two-year term on count 2. His other claim has no merit, and we affirm the judgment as modified.

FACTS

In June 2015, Santa Ana Police Officer Joe Castellanos stopped Sharp for riding his bicycle on Civic Center property, a violation of a municipal ordinance. After stopping Sharp, Castellanos performed a patdown search on Sharp for officer safety purposes. Sharp was dressed in baggy shorts and a tank top in “all blue colors.” Castellanos stated he “noticed that everything from top to bottom was all blue, and I’m familiar with the gang Watergate Crips which is part of Santa Ana West Side Gang.” In response to a question whether Sharp’s attire drew Castellanos’s concern, he responded, “[m]ost people that are involved in gangs normally carry guns, narcotics, any kind of weapons.” The baggy nature of Sharp’s clothing looked capable of concealing weapons. Castellanos received extensive gang training from both the Marine Corps and as a police officer.

During the patdown, Castellanos felt a plastic container in Sharp’s pocket. Castellanos recognized the container as the type commonly used to package marijuana. Castellanos asked Sharp what was in the container, and Sharp stated it was marijuana. Castellanos then asked Sharp if he had a marijuana prescription, and Sharp said he had one but he left it at home.

Castellanos asked Sharp if he could remove the container, and Sharp told him to “go ahead.” When Castellanos opened the container he discovered it contained 2.515 grams of methamphetamine wrapped in a plastic sheet. Castellanos also discovered \$35 in various denominations and \$160 in Sharp’s wallet. Sharp told Castellanos the money was from “general relief” and was for rent. Sharp also had a lighter and a cell phone in his possession. He did not have any drug paraphernalia and did not display any physical or behavioral signs of methamphetamine use.

Count 1 of the information charged Sharp with sale or transportation of methamphetamine and count 2 with possessing methamphetamine for sale. Pursuant to Penal Code section 1203.07, subdivision (a)(11),¹ the information also alleged two prior convictions for sale of transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) as to counts 1 and 2. The information further alleged Sharp had been previously convicted of a felony violation of Health & Safety Code, section 11352, subdivision (a), and he had two prior serious and violent felony convictions. The information alleged Sharp had served a prior prison term pursuant to section 667.5, subdivision (b).

Before trial, Sharp moved to suppress the methamphetamine evidence, alleging unlawful search and seizure of his person. The trial court denied Sharp’s suppression motion, determining the search was “for officer safety purposes and the contraband was discovered during the course of that search.”

The jury found Sharp guilty on both counts 1 and 2. In a bifurcated proceeding, Sharp admitted as true the prior conviction and sentencing allegations. The trial court struck the sentencing allegations and sentenced Sharp to a two-year prison term on counts 1 and 2, to be served concurrently.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

DISCUSSION

Motion to Suppress

Sharp contends the trial court erred in denying his suppression motion. He claims the search was unreasonable because there was no reason to suspect Sharp was armed and dangerous. Sharp further asserts that even if the search was lawful, Castellanos exceeded the proper scope of a search when he searched the closed container in Sharp's pocket. We address each of Sharp's arguments in turn. We are mindful of our standard of review: "In reviewing a suppression ruling, 'we defer to the superior court's express and implied factual findings if they are supported by substantial evidence, [but] we exercise our independent judgment in determining the legality of a search on the facts so found. [Citations.]'" (*People v. Lomax* (2010) 49 Cal.4th 530, 563.)

Under the Fourth Amendment to the United States Constitution, a police officer may stop and detain an individual where the officer has a reasonable suspicion the person has committed a criminal offense. (*Terry v. State of Ohio* (1968) 392 U.S. 1, 21- 22, 30 (*Terry*).) Police officers may then conduct a patdown search for weapons where "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (*Id.* at p. 21; *In re H.M.* (2008) 167 Cal.App.4th 136, 142-143.) In evaluating the standard, facts are "judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" (*Terry, supra*, 392 U.S. at pp. 21-22.)

Castellanos detained Sharp after witnessing him commit the public offense of bicycling in the Civic Center area. Castellanos articulated several factors for why he felt a patdown search of Sharp was necessary, including the following: Sharp's all-blue clothing signaling potential gang affiliation; the bagginess of Sharp's clothing, which was capable of concealing a weapon; and Castellanos's experience that many gang members carried guns and other weapons.

Sharp argues Castellanos did not testify Sharp's clothing was gang attire or he believed Sharp to be a gang member. Sharp concludes this demonstrated the trial court erred in determining the officer had reasonable suspicion to search Sharp for weapons because he was wearing potential gang clothing. Sharp's argument focuses too closely on the precise language used by Castellanos, and ignores the fact that while *Terry* requires specific and articulable facts, it also considers rational inferences from those facts. Sharp is correct Castellanos did not identify him as a gang member or testify Sharp's clothes were gang clothing. Castellanos's testimony, however, when taken as a whole and drawing all reasonable inferences from it, demonstrates the limited search was appropriate given Sharp's baggy, all-blue attire in an area of known gang activity.

Sharp cites *People v. Sandoval* (2008) 163 Cal.App.4th 205 (*Sandoval*), for the proposition his baggy blue clothing was insufficient to form the basis for a patdown search. *Sandoval*, however, is distinguishable. There, officers were executing a search of a residence. (*Id.* at p. 208.) Defendant was sitting on the steps to the porch of the residence, smoking a cigarette. (*Ibid.*) After the house was cleared, Defendant was searched and methamphetamine was discovered. (*Id.* at p. 209.) "Before conducting the pat down, the officer had no reason to believe defendant was armed or was committing a crime." (*Ibid.*) Here, unlike in *Sandoval*, Castellanos observed Sharp commit a public offense, and specified he performed the patdown search because Sharp's clothing was similar in its color to a gang active in the area, and Sharp's baggy clothing appeared capable of concealing weapons.

Sharp's argument there was no reason to detain him to search him because the bicycling infraction did not require further investigation ignores the realities of police work. It would be irresponsible and unsafe not to allow an officer issuing a minor infraction the same ability to conduct a patdown search for officer safety as crimes that require extensive investigation. While Castellanos may not have needed to investigate the crime, he did need to interact with and come in close proximity to Sharp. Being able

to determine whether Sharp was armed or presented a danger to Castellanos or his partner was crucial for officer safety. This does not change based upon the nature of the offense.

Sharp argues even if the initial patdown search was proper, Castellanos exceeded its permissible scope by searching a closed container in Sharp's pocket. During the course of the patdown search, Castellanos felt a plastic container inside Sharp's pocket and testified he recognized the container as one used to package marijuana. Castellanos did not immediately seize the container, and instead asked Sharp what it was. Sharp said it was marijuana. Castellanos asked Sharp if he had a marijuana prescription and Sharp responded he did not have his prescription with him. Castellanos then asked Sharp if he could remove the container, and Sharp told him to "go ahead." Sharp's statement gave Castellanos probable cause to believe Sharp was illegally possessing marijuana. The removal of the container was thus authorized as a search incident to arrest. (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1076-1077 ["Once defendant told the officer that he had methamphetamine, the officer had probable cause to arrest defendant. Further, since it is unimportant whether a search incident to an arrest precedes the arrest or vice versa, the officer could thoroughly search defendant *even before* he had officially arrested him-so long as there was probable cause to arrest. [Citation.] The retrieval of the methamphetamine from defendant's socks was lawful as a search incident to a lawful arrest."].)

Because we conclude the officer's search was justified and did not exceed its scope, we need not consider Sharp's contention his consent was coerced. We conclude the trial court correctly denied the motion to suppress.

Section 654

Section 654, subdivision (a), states in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Pursuant to this

provision, when a defendant commits one act giving rise to both a drug transportation and possession conviction, the imposition of a single sentence is generally warranted.

(*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.)

The trial court used count 1, sale or transportation of methamphetamine, as the primary term. The Attorney General concedes the court erred by not staying Sharp's sentence on count 2 because there was no evidence of a second act of possession for sale. This was a single act that should not result in multiple punishments. Accordingly, the two-year sentence imposed for count 2 should be stayed.

DISPOSITION

We affirm the convictions but modify the judgment. The two-year term imposed on count 2 is ordered stayed pursuant to section 654. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and forward a copy to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.